2013 WL 3488074 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

Nathan K. BARKER, Appellant,
v.
STATE OF INDIANA, Appellee.

No. 73A01-1212-CR-00575.
May 29, 2013.

Appeal from the Shelby County Circuit Court
Trial Court Cause # 73C01-1108-FA-15
The Honorable Charles O'Connor, Judge

Appellant's Brief

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*1 STATEMENT OF THE ISSUES

Whether the trial court abused its discretion by failing to assign relative weight to Appellant's guilty plea and Appellant's remorse as potential significant mitigating factors. Whether the trial court abused its discretion by assigning significant weight to an aggravator that is an element of the crime. Whether the trial court erred in sentencing Appellant in excess of the terms of his guilty plea. Lastly, the Appellant requests the Indiana Court of Appeals to review the appropriateness of the trial court's sentence pursuant to Appellate Rule 7(B).

STATEMENT OF THE CASE

On August 1, 2011, an unresponsive Jasper Simpson was rushed to Riley Children's Hospital. Jasper, just twenty-two months-old, died of injuries on the morning of August 2, 2011. (App. at 10). The State of Indiana filed the following charges against Appellant on August 22, 2011: Count I **Neglect** of a Dependent Resulting in Death as a Class 'A' Felony, Count II Battery Resulting in Death as a Class 'A' Felony, and Count III **Neglect** of a Dependent as a Class 'D' Felony. Appellant entered a plea of guilty to Count Ion September 18, 2012. (App. at ***2** 21-24). The written plea agreement capped the executed portion of Appellant's sentence at forty (40) years; counts II and I would be dismissed pursuant to the plea agreement. (App. at 21).

On November 29, 2012, the court held a sentencing hearing. During the hearing, Appellant called one (1) witness. The State of Indiana called three (3) witnesses. Arguments were then presented. The court sentenced Appellant to a forty-five year (45) sentence, with forty (40) years executed to the Indiana Department of Correction and four (4) months executed on home detention, meeting and exceeding the maximum allowed under the negotiated plea agreement. The remaining portion of the sentence was suspended to probation. (App. at 167-68, Tr. at 55-56). In explaining the determination of the sentence, the trial noted three (3) aggravating factors and one (1) mitigating factor. Appellant now respectfully appeals his sentence.

STATEMENT OF THE FACTS

On August 1, 2011, Amanda R. Simpson left for work around 10:00 a.m. leaving her twenty-two month-old son, Jasper R. Simpson, with her live-in boyfriend Nathan K. Barker. (App. at 8). Around 1:00 p.m., Barker called Simpson and informed her that Jasper had fallen off the couch and struck his head. Barker explained that he had called paramedics out to the apartment and they said Jasper would be fine. Further investigation revealed that the paramedics had not been called. (App. at 9). When Amanda Simpson arrived home from work around 2:40 p.m., Jasper was acting sleepy. Simpson fed Jasper a popsicle, which he vomited up. Simpson eventually put Jasper to bed to sleep. Around 11:48 p.m. she checked on Jasper and discovered he

was no longer breathing. She immediately called 911. (App. at 9, 144). Jasper received immediate treatment from paramedics, and was soon transported from W.S. Major Hospital in Shelbyville to Riley Children's Hospital in Indianapolis. (App. at 9-10). Jasper died of his ***3** injuries on August 2, 2011. (App. at 10). Jasper's death was ruled a homicide by Dr. Sozio of the Marion County Coroner's Office. (App at 10).

The State of Indiana filed the following charges against Appellant on August 22, 2011: Count I **Neglect** of a Dependent Resulting in Death as a Class 'A' Felony, Count II Battery Resulting in Death as a Class 'A' Felony, and Count III **Neglect** of a Dependent as a Class 'D' Felony. [1] (App. at 12). On September 13, a "Joint Motion to Enter Plea of Guilty and Advisement of Rights and Waiver" was filed with the trial court. The written plea agreement indicated Appellant would plead guilty to Count I, **Neglect** of a Dependent Resulting in Death as a Class 'A' Felony; counts II and III would be dismissed. (App. at 21-22). The written plea agreement capped Appellant's executed time at forty (40) years, leaving the total sentence and conditions open to the trial court's discretion. (App. at 21). On September 18, 2012, Appellant entered his plea of guilty. (App. at 5).

On November 29, 2012, a sentencing hearing was conducted. Appellant called one (1) witness on his behalf, and also submitted a sentencing memorandum for the trial court's consideration. (App. at 6). The State called three (3) witnesses. Additionally, numerous letters were submitted on the behalf of and against Appellant. Appellant also wrote a letter expressing remorse. (App. at 163-64). Lastly, the day before the hearing, the State filed a "Notice of Filing of Exhibits for Sentencing Purposes" which included the deposition of Dr. Tara Harris in its entirety. [2] (App. at 42-119).

After considering the evidence, the trial court sentenced Appellant to a forty-five (45) year sentence, with forty (40) years executed and five (5) years suspended to probation. Additionally, the Defendant was ordered to serve one hundred and twenty (120) actual days of ***4** home detention. The trial court's sentencing order considered many statutory sentencing factors, but specifically cited three (3) aggravating factors and one (1) mitigating factor. (App. at 165-68). Appellant now appeals the trial court's sentence.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion when sentencing Appellant. The trial court omitted various mitigating factors that were supported by the record. These factors include Appellant's guilty plea, and his expression of remorse. Said factors would have significantly impacted the trial court's decision and amounts to more than mere harmless error. The trial court also abused its discretion in assigning significant weight on an aggravating factor that is an element of the offense Appellant pled guilty to. The trial court exceeded the terms of the plea agreement by sentencing Appellant in excess of the "cap" on executed time. Lastly, the sentence rendered by the trial court is inappropriate given the nature of the offense and the character of the Appellant.

ARGUMENT

I. The trial court abused its discretion in omitting for consideration several significant mitigating factors, supported by the record, which would have impacted Appellant's overall sentence.

Standard of Review

Omissions of reasons arguably supported by the record are reviewable on appeal for abuse of discretion. Anglemyer v. State, 875 N.E.2d 218 (2007).

Argument

A. Appellant's plea of guilty was a significant mitigator, supported by the record, but not considered by the trial court.

***5** Appellant's plea of guilty and expression of remorse were significant mitigators supported by the record but ignored by the trial court. The trial court omitted the mitigating factor of Appellant's guilty plea in the sentencing order. (App. at 165-68). The sheer number of State's witnesses on the witness list demonstrates the magnitude with which the State would have been burdened had Appellant exercised his constitutional right to a trial by jury. (App. at 14-20). Coupled with the natural emotional feelings, this matter would have taken an extreme emotional, physical, and fiscal toll on all parties associated with it. Appellant's plea of guilty should therefore be viewed as a significant mitigating factor.

A guilty plea is not always an automatic significant mitigating factor, especially if it can be demonstrated that a defendant received a substantial benefit from the plea. *Brown v. State*, 907 N.E.2d 591 at 594 (Ind.Ct.App. 2009). Moreover, a guilty plea may not always rise to the level of a significant mitigator if the decision to plead guilty is merely a pragmatic one. Id. However, in the instant matter, Appellant's guilty plea avoided a long and costly trial by jury. The State's witness list had at least seventy (70) witnesses. (App. at 14-17). A dead toddler is something that would emotionally impact any juror involved, and would certainly open the fresh wounds of the victim's mother, grandparents, friends, and family. Lastly, regarding a potential jury trial, the natural defense to the charges would be casting the spotlight on the only other person living in the apartment: the mother. A potential cross-examination may have included, to name a few, questioning her regarding allegations of **neglect** while she was present with the victim, causation, the presence of certain injuries, questions regarding why she was so late for work [3], and further investigating her lack of action between her arrival home from work at 2:40 ***6** p.m. and 11:48 p.m. when she called paramedics. Such an examination would have been strategically sound but emotionally devastating [4]. (App. at 144). Appellant chose a different course for all involved, accepted responsibility, and pled guilty.

"A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial." Gibson v. State, 856 N.E.2nd 142 (Ind.Ct.App. 2006) quoting Francis v. State, 817 N.E.2d at 237-38. In Gibson, the Court of Appeals found error in not taking Gibson's guilty plea into consideration as a substantial mitigating factor. Gibson at 149. In that case, Gibson had struck and killed a motorcyclist while attempting to pass a line of vehicles. Gibson had a BAC level of .076, but still pled guilty to two (2) counts that involved requiring the State of Indiana to prove intoxication beyond a reasonable doubt. Gibson pled guilty to all counts and received no benefit from the State of Indiana in return for his guilty plea, nor did Gibson receive consideration in the form of a mitigating factor and the Court reversed. Id. at 148-49.

Similarly, Appellant in the instant matter received little consideration from the State in the form of an aggravated "cap" in his executed time. See Caraway v. State, 959 N.E.2d 847 (Ind.Ct.App. 2011) (small benefit of dismissing count II in a murder case still resulted in the Court of Appeals reversing and remanding for not taking Caraway's guilty plea into consideration). In return for his guilty plea, the State dismissed Counts II and III. [5] (App. at 21, 167). Moreover, he received a "cap" on executed time of forty (40) years, which was ten (10) years higher than the presumptive. The trial court not only gave him the maximum-allowable ***7** time in prison under the plea, the trial court exceeded the scope and terms of the plea by adding an additional one hundred and twenty day of actual home detention. (App. at 167-68, Tr. at 55).

Appellant had limited criminal history with no felony convictions. Appellant received absolutely no consideration from the trial court in the form of a mitigating factor. Appellant's trial counsel argued his guilty plea at sentencing. Tr. at 44 (check). Even if not strenuously argued, the defendant may argue on appeal that the trial court abused its discretion in failing to find the plea as a mitigating factor's at 853. This mitigating factor was omitted from any mention in the trial court's Sentencing Order. (App. at 165-68). Appellant notes that the trial court was discretionarily prudent to list numerous statutory and non-statutory factors in the Sentencing Order, and specifically assigned weight to three (3) aggravating and one (1) mitigating factors. (App.

at 165-68). Appellant can only conclude that the trial court omitted from consideration his plea of guilty and said plea should have been a significant mitigating factor.

B. Appellant's expression of remorse was a significant mitigator, supported by the record, but not considered by the trial court.

Appellant expressed remorse over the death of Jasper, and trial court's Sentencing Order omitted this significant mitigating factor. On November 29, 2012, Appellant submitted a letter for the Court' consideration; the first two (2) paragraphs of the letter deals with Appellant's contrition, impact on his life, and sincerest apologies to the victim' family. (App. at 163-64). This letter was mentioned during Appellant's counsel's closing arguments during sentencing. (Tr. at 44). Appellant also explained to the Presentence Investigator that he "feel's] awful about it." (App. at 127). As with Appellant's guilty plea, the trial court omitted mentioning this factor altogether, be it a substantial mitigating factor or merely a factor considered. (App. at 165-68).

***8** Although the Appellant did not testify at his sentencing, this letter speaks volumes as to his remorse and contrition for what had happened. Appellant's remorse is far beyond those examples provided by our Supreme Court of defendants convicted of crimes and not accepting full responsibility or displaying remorse. See e.g. Price v. State, 765 N.E.2d 1245 (2002) (Court rejected defendant's claim of remorse where defendant empathized with victim's family by analogizing defendant's mother's natural death with murder); Bonds v. State, 721 N.E.2d 1238 (1999) (Court did not err when not finding remorse where defendant claimed remorse by stating he did not know what went wrong and that he was simply in the wrong place at the wrong time).

II. The trial court abused its discretion in finding an element of the crime as a significant aggravating factor.

Standard of Review

Improperly-considered aggravators considered during sentencing are reviewable on appeal for abuse of discretion. *Anglemyer v. State*, 875 N.E.2d 218 (2007).

Argument

In the trial court's Sentencing Order, significant weight was given to the aggravating factor that "[d]efendant was in a position of care, custody and control of the victim when this offense occurred...[d]efendant's mother was providing child care while the victim's mother was working." (App. at 167). While a trial court may certainly explore the nature and circumstances of the crime in determining aggravating circumstances, it is inappropriate to use a material element of the offense as an aggravating circumstance. Lemos v. State, 746 N.E.2d 972 (2001).

Appellant pled guilty to **Neglect** of a Dependent Resulting in Death as a Class 'A' Felony. The Indiana Code defines a dependent (in pertinent parts) as "an unemancipated person who is under eighteen (18) years of age." See I.C. 35-46-1-1. Given the plain language and ***9** meaning of what a dependent is under the circumstances, it is hard to conceive a hypothetical in which it *would not* be the case that a young victim is in the position and care of a particular defendant while such a terrible offense is committed. Thus, it was inappropriate for the trial court to find a significant aggravating factor that the dependent in this matter (by definition, a material element of the offense), was in the care, custody, or control of the Appellant. [6] *Id.*

III. The trial court abused its discretion by sentencing Appellant in excess of the terms of his guilty plea agreement.

The trial court did not sentence Appellant in accordance with the terms of his guilty plea agreement. Appellant's guilty plea agreement called for a "cap" of forty (40) years on executed time. Specifically, "[s]entencing shall be open to the court's discretion...[t]he executed portion of any sentence, however, shall not exceed forty (40) years." (App. at 21). The trial court's

sentence was a forty-five (45) year sentence with forty (40) years executed to the Indiana Department of Correction and five (5) suspended to probation with an additional 120 days to be served on home detention. (App. at 167-68, Tr. at 55-56). I.C. 35-38-2.6-6 states as follows:

> (a) As used in this subsection, "home" means the actual living area of the temporary or permanent resident of a person. A person who is placed in a community corrections program under this chapter is entitled to earn credit time under I.C. 35-50-6.

Home detention is executed time. The trial court erred in exceeding the forty (40) year "cap" on executed time. See, generally, Valenzuela v. State, 898 N.E.2d 480 (Ind.Ct.App. 2008). Even though the record is silent to such, it would not matter if this home detention is a condition of probation. Cottingham v. State, 971 N.E.2d 82 (Ind. 2012) and Peterink v. State, 928 N.E.2d 1009 (Ind. 2013).

***10 IV. Appellant's forty-five (45) year aggravated sentence was inappropriate in light of the nature of the offense and the character of the Appellant.**

Standard of Review

Pursuant to Indiana Appellate Rule 7(B), an appellate court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The defendant bears the burden of persuading us that his sentence meets the inappropriateness standard of review. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. "[R]egarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Id. at 494. Indiana Courts have long recognized that the maximum sentence permitted by law should be reserved for the very worst offenders, *Bacher v. State*, 686 N.E.2d 791, 802 (Ind. 1997).

Argument

The trial court gave a detailed analysis of its decision in the Sentencing Order file-stamped on December 7, 2012. In the order, the court detailed all the statutory factors relevant to the sentencing hearing that it had considered but declined to assign any weight. (App. at 165-66). Additionally, although Appellant did not testify at his sentencing he did submit a letter to the court. Appellant's trial counsel also submitted a "Sentencing Report for Nathan Barker" for the court's consideration. (App. at 25-41). The court listed three (3) specific aggravators and assigned said aggravators "significant weight." (App. at 166-67). These factors were the myriad of injuries suffered by the victim gleaned from Dr. Harris's deposition, that the Appellant was in a position of care of the victim when the offense occurred, and that the Appellant had the ***11** opportunity to seek medical care and did not seek said care. (App. at 167). The court additionally found one (1) mitigating factor: that Appellant's family has had a history of Huntington's Disease, a terrible and traumatizing disease that is both genetic and fatal. The court assigned this mitigating factor "moderate weight." (App. at 167). Using these sentencing factors, the trial court sentenced Appellant to, and actually exceeded, the maximum amount allowed under the plea agreement.

A. Nature of the offense.

The circumstances of this particular case are absolutely tragic. When the lives of the innocent are terminated prematurely, it pulls on the heartstrings of any mother or father. The emotional impact of these particular events is certainly significant. The Indiana legislature, however, has already considered the severity in which these sorts of **neglect** should be dealt with. The circumstances in this case must be balanced in view of the fact that the legislature has already built into its sentencing range the consequences to victims, moral revulsion, and other factors inherent in the crime. Cardwell v. State, 895 N.E.2nd 1219, (2008). Thus, the nature of the offense has already been considered when Appellant was charged with a Class 'A' Felony with a

sentencing range of twenty (20) years to fifty (50) years, and a advisory of thirty (30) years. The offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. Anglemyer at 494.

Appellant certainly does not diminish the tragic impact of this crime, the solemn and sad permanency of the consequence, and the hollowness the victim's family feels; rather, Appellant respectfully requests this Court to take into consideration the state legislature's contemplated consequences to such acts.

B. Character of the Appellant.

***12** For its consideration, the trial court had a sentencing report outlining the details of Appellant's character and life in general. (App. at 165-68). Appellant suffered unspeakable tragedy of watching Huntington's Disease debilitate his father until he was essentially in a vegetative state unable to communicate with his son. The disease is genetic, and the Appellant had lost his father, grandmother, and an aunt to the disease, with another bedridden and dying. (App. at 27). The Appellant has not been tested for the terminal disease, and currently does not know whether or not he has it.[7] This uncertainty of whether or not he has a horrendous disease has caused Appellant severe stress, which he had sought treatment for, including a stay at the Columbus Regional Hospital Stress Center. (App. at 31-32, 126). Essentially, he was mentally exhausted from taking care of his father while watching his slow and painful deterioration. He additionally developed "nurse's back" that exacerbated his scoliosis leading to a prescription of Klonopin. (App. at 31-32). The care and sacrifice he had shown towards his father while he deteriorated demonstrates compassion. The mother of the victim was a long-time friend of the Appellant's, and one with whom he had an intermittent relationship with. In the sentencing report, the Appellant explains that he re-entered a relationship with the victim's mother to help her combat drug addiction. (App. at 28-29). This act also demonstrates compassion. Appellant also demonstrated rehabilitative foundation beyond seeking treatment for mental health issues. He had graduated from high school, and had completed an additional 1.5 years of undergraduate studies. (App. at 30-31, 125). Lastly, Appellant's mother has been burdened by such a lengthy sentence, having lost her husband to Huntington's Disease and now losing her only remaining member of her nuclear family to a lengthy prison term. (App. at 38-39, 163-64). While not a dependent, such an impact on a widow should be considered in an appropriateness review.

***13** Coupled with compassion was Appellant's remorseful letter, mentioned supra, expressing daily remorse and reflection upon what he had done. (App. at 163, see also App at 127). Appellant was cooperative with police, spoke with detectives on the morning of Jasper's passing, and he was cooperative by pleading guilty, thereby avoiding a lengthy and emotional trial. (App. at 146-48). This case is far from being one where it was pragmatic for Appellant to plead guilty. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind.Ct.App. 2005). Indeed, Jasper was being watched in an apartment where at least three (3) people were staying with a deceased child that had a laundry list of injuries that nobody, including the Appellant, did anything about until approximately nine (9) hours later. (App. at 144). There was and would have been motivation for all the witnesses in the house to testify untruthfully. It would have been extremely stressful and emotional. Appellant's acceptance of full responsibility and cooperation with police should be considered in the appropriateness analysis. This conviction is Appellant's first felony conviction, and had two (2) misdemeanor convictions on his record. (App. at 123-24). Appellant has also never served a long term executed sentence. *See Kovats v. State*, 982 N.E.2d 409 (Ind.Ct.App. 2013); *Powell v. State*, 751 N.E.2d 311 (Ind.Ct.App. 2001).

Appellant is certainly not among the "worst offenders." *Kovats* at 416-17. The nature of the crime is horrific. As the Court reasoned in Kovats, when an offender is not the "worst offender," but the crime is horrific in nature, a sentence less than the maximum but greater than the advisory may be appropriate. In the *Kovats* decision, Kovats was taking care of and driving an **elderly** woman when she drove off from a gas station without paying. The police gave pursuit. While in pursuit, *Kovats* placed many other people in danger while driving exceedingly reckless. She eventually lost control and crashed, causing extreme pain to her **elderly** charge. Her **elderly** charge died six (6) weeks later while suffering horrendously. Id at 412-13, 416. ***14** Kovats was tried and convicted of a Class & Felony **neglect** of a dependent and three (3) Class 'D' Felonies. She was sentenced to twenty-two (22) years. *Id.* at 413. The Court on appeal revised the sentence to an aggregate of fifteen (15) years. Relevant to the Court's holding was Kovat's not being the "worst offender," but the crime being horrific. She had never been convicted of a felony, had dependents, sought treatment, and had never been incarcerated for an extended period of time. The Court

found Kovat's request for the advisory was not appropriate given the horrific nature of the crime alone. *Id.* at 416-17. The Court in Kovats found that the crime certainly fit within the classification of worst offense, yet still found the sentence to be inappropriate. *Id.*

Similarly, we have Appellant, who is far from the "worst offender," but have an offense that is certainly about as horrific as one can conceive. Appellant has never been convicted of a felony, has sought treatment when appropriate, only has his mother left in his immediate family, and has never been incarcerated in prison for an extended period of time. Unlike Kovats, Appellant also cooperated with law enforcement, pled guilty, and accepted responsibility for the crime. [8] This significant mitigating factor not present in Kovats should allow for a reasonable request of the advisory sentence in the current matter.

Ultimately, our Indiana Supreme Court has stated that the aggregate sentence and how it is to be served are the issues that matter. *Cardwell v. State,* 895 N.E.2d 1219 (2008). Therefore, Appellant argues that a thirty-five year sentence would be appropriate. Appellant respectfully requests an executed advisory sentence reflecting the worst offense, but also a salvageable soul demonstrating the ability to be rehabilitated back into society. Twenty-eight (28) years should be executed to the Indiana Department of Correction, with an additional two (2) years of community corrections served on home detention for reintegration purposes. See generally *Hole* ***15** *v. State,* 851 N.E.2d 302, 304 (Ind. 2006) (observing that placement at the Department of Correction instead of Community Corrections may be challenged on appeal under Rule 7(B)). The additional five (5) years would be suspended to either active or inactive probation.

CONCLUSION

For the foregoing reason, Appellant respectfully requests the Court reverse and remand for sentencing. Alternatively, to avoid a potentially similar sentence by the trial court using a different matrix, Appellant respectfully requests the Court to exercise discretion under Indiana Appellate Rule 7(B) and revise Appellant's sentence in light of the nature of the offense and the character of the Appellant.

Footnotes

1 No **neglect** charges were ever filed against Jasper's mother, Amanda Simpson. 2

2 Dr. Harris did not testify at the sentencing hearing; it is unknown whether or not she was available to testify. Her testimony in the deposition was used as an aggravating factor adding "significant weight." (App. at 166-67)

3 The victim's mother told investigators that her shift was between 6:00 a.m. and 2:40 p.m., but on the day of the incident she did not leave for work until 9:45 a.m. (App. at 144). First responders were not called until 11:48 at night, a full nine (9) hours after mother's shift had ended. (App. at 146-46). The State's expert believed, without explanation, that the injuries occurred on the day of the mother's shorter shift. (App. at 71).

4 Appellate counsel did not represent Appellant at the trial level.

5 The State of Indiana had filed the Class D Felony **Neglect** of a Dependent as a lesser-included count to Count I, which at least demonstrates a concern the State had regarding causation of who, what, and when killed Jasper. This case was far from an easy, pragmatic win for the State.

6 Appellant concedes that the "care, custody, or control" is a proper statutory factor under I.C. 35-38-1-7.1(a)(8), but said factor simply is an element ofI.C. 35-46-1-4(b)(3).

7 For more on Huntington's Disease, including psychiatric implications, please visit www.mayoclinic.com.

8 Kovats was found guilty after a four (4) day jury trial. *Kovats* at 413.